

OUTDOOR ADVENTURE RIVER SPECIALISTS, INC.

IBLA 79-233

Decided June 14, 1979

Appeal from decisions of the Moab, Utah, District Office, Bureau of Land Management, rejecting special use permit applications for 1978 and 1979 and assessing trespass damages.

Affirmed in part; reversed in part and remanded.

1. Application and Entries: Generally -- Public Land: Special Use Permit -- Special Use Permits

Where an application for a special use permit is not filed until more than 10 months after a deadline for doing so imposed by BLM, it is properly rejected.

2. Trespass: Generally -- Trespass: Measure of Damages  
Where there has been an unauthorized use of the public lands, BLM may assess damages against the trespasser and serve him with a demand for payment thereof, prior to turning the matter over to the Department of Justice for initiation of judicial proceedings. Where BLM assesses trespass damages based on the reasonable value, extent, and duration of an unauthorized use of the public lands, this assessment will not be disturbed unless the trespasser submits convincing evidence that it is incorrect.

3. Public Land: Special Use Permit -- Special Use Permits

Where a permittee is not familiar with an unpublished BLM policy to the effect that the tardy filing of an application for permit renewal in 1978 makes the permittee a

"new" applicant in 1979 and, as such, ineligible to receive a permit, BLM's decision enforcing this policy and rejecting the permittee's 1979 application will be reversed.

APPEARANCES: George R. Wendt, President, Outdoor Adventure River Specialists, Inc.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

Outdoor Adventure River Specialists, Inc. (OARS), has appealed from two decisions of the Moab, Utah, District Office, Bureau of Land Management (BLM). The first, dated December 20, 1978, rejected its application for a special use permit <sup>1/</sup> for 1978 to use parts of the San Juan, Colorado, and Dolores Rivers for commercial river trips, and assessed a trespass fee of \$25 for using these rivers in 1978 without a special use permit. The second, dated April 12, 1979, rejected a similar application for 1979.

[1] OARS did not file its 1978 application for renewal of its special use permit until November 17, 1978, more than 10 months after the deadline of January 31, 1978, imposed by BLM, and nearly 5 months after it had used the San Juan River for commercial river trips. In its statement of reasons, OARS admits its oversight in failing to apply timely for renewal of its 1977 permit and that it used the river twice without a valid permit in 1978.

While the regulations governing special use permits, 43 CFR Part 2920, do not expressly provide for deadlines for applications, we are not disposed to tamper with the procedures established by BLM in this instance. Competent administration of the public lands requires the establishing of deadlines for applying to use the lands, and it was not unreasonable for BLM to require OARS to file a new application each year for its special use permit. BLM offered OARS several opportunities to file its application even after the passing of the deadline. OARS does not dispute the imposition of the deadline, nor does it deny its negligence in failing to submit its application when invited to do so by BLM.

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<sup>1/</sup> According to BLM Organic Act Directive No. 76-15, following the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. (1976), BLM technically stopped issuing "special use permits," as its authority to do so was "no longer applicable." Instead, BLM began to issue "temporary use permits" under section 302(b) of FLPMA and, pending the issuance of new regulations, under 43 CFR Part 2920. Wilderness River Outfitters and Trail Expeditions, Inc., 30 IBLA 148 n.1 (1977). Nevertheless, BLM continues to refer to these permits as "special use permits," and we shall also.

[2] Nor does OARS deny that it used Federal lands without having a permit to do so. The record shows that it used the San Juan River twice in June 1978 after its 1977 permit had expired, and prior to applying for its 1978 use permit.

Under 43 CFR 2801.1-4, "[a]ny occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass." Any occupation of the land prior to the issuance of a use permit is unauthorized and constitutes a trespass. 43 CFR 2920.5.

Where there has been unauthorized use of public lands, BLM may assess damages against the trespasser, including a business entity, and serve it with a demand for payment thereof, prior to turning the matter over to the Department of Justice for initiation of judicial proceedings. 43 CFR 9239.0-9(b), 9239.2-3; Gold Mountain Logging Co., 34 IBLA 326 (1978); see Feliciano Y. Jiminez, 30 IBLA 82, 85 (1977); Southern Pacific Transportation Co., 23 IBLA 232, 256-7, 83 I.D. 1, 11-12 (1976); Lloyd L. Clark, 17 IBLA 201, 214, 81 I.D. 548, 552 (1974); Richard O. Morgan, 10 IBLA 141, 143 (1973). See also 43 CFR 9239.7-1. Thus, we affirm BLM's decision to assess trespass damages.

We also affirm BLM's assessment of the amount due as damages. Where BLM's assessment is based on the reasonable value, extent, and duration of the unlawful occupancy, it will be affirmed in the absence of evidence provided by the trespasser establishing that it is in error. Gold Mountain Logging Co., supra, and cases cited. OARS has not objected to the assessment of \$25 in trespass damages.

[3] OARS argues that BLM's decision not to grant its 1979 application on account of its failure to apply timely in 1978 and/or its unauthorized use of the river without a permit in 1978 is in error. We agree.

In its decision of April 12, 1979, BLM rejected OARS' 1979 application because it regarded OARS as a new applicant in 1979, as its 1978 application had been rejected. 2/ In support of this decision, BLM stated as follows:

BLM policy in Utah has been to only issue permits to outfitters who held permits the previous year. If a permit lapses because of failure to apply in a timely manner, or is canceled for cause, the applicant is treated as a new applicant on the river. Until management plans which determine proper carrying capacity and

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2/ OARS could only be regarded as a "new" applicant by interpretation of policy. In actuality, OARS declares that it has been operating under a BLM permit from the Moab District Office since 1973 when such permits were first issued, and previous to that back to 1967.

use distribution are completed on these rivers, we will not be issuing any new commercial recreation use permits.

BLM offered no citations indicating that this policy is supported by Departmental regulations or that it was initiated by the Secretariat or the Director of BLM. It appears from this statement that the policy originated with the BLM District or State Office.

The policy set out above is not mandated by any rule duly adopted by the rulemaking procedures contemplated by section 310 of FLPMA, 43 U.S.C. § 1740 (1976) and section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). There was apparently no published notice of the policy, as there would have been for a duly-promulgated Departmental rule. Nor was this policy set out in the terms of the permit issued to OARS. In fact, a review of the case file reveals no reference to it, although BLM has constantly and carefully advised permittees as to the terms of other policies, and changes therein, and has solicited their comments and suggestions on proposed policies. Thus, OARS apparently had no notice that, by dint of this policy, its failure to submit an application timely in 1978 would bar its being considered for permits in the future.

In Wilderness River Outfitters and Trail Expeditions, Inc., 30 IBLA 148 (1977), and again in Canyoners, Inc., 30 IBLA 354 (1977), the Board reversed BLM's denial of renewal of use allocations because the applicant had failed to use its full allocation the year before, holding that the applicants were unaware of the "use or lose policy," as they had not had time to appreciate fully the nuances of the river permit program. While this program is no longer new, BLM apparently has only recently adopted the policy in question, and OARS was unaware of it. Thus, the rationale of these cases is apt.

The record shows that OARS is an established commercial river-trip venture which enjoys an excellent reputation with BLM officials for diligently following BLM operational procedures during its river trips. There is nothing in the record to suggest that the District Office would have denied OARS 1978 and 1979 permits if timely application had been made for the 1978 permit. If thus appears that a very severe penalty has been imposed in consequence of appellant's oversight, even though BLM's action was not intended to be punitive. As OARS was without notice that its failure to apply timely in 1978 was prejudicial to its 1979 application, we hold that its 1979 application should not be rejected. 3/

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3/ We note that our holding will neither add a new burden of traffic to the subject waterways nor impinge on the privileges of any other permittee, as appellant states, "We are not a new outfitter. Our use will not alter the carrying capacity of the rivers in question and I understand that our use is not being reallocated to anyone else."

Having disposed of this appeal for the foregoing reasons, it is unnecessary to consider whether the adoption of this policy exceeded BLM's regular authority or violated prescribed rulemaking procedures.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for further consideration consistent herewith.

Edward W. Stuebing  
Administrative Judge

I concur:

Anne Poindexter Lewis  
Administrative Judge

FREDERICK FISHMAN, ADMINISTRATIVE JUDGE CONCURRING SPECIALLY:

I have no objection to the holdings of the decision, but I seriously question the assumption that the Bureau of Land Management (BLM) has authority to regulate commercial use of what appears to be, at least in part, navigable rivers. See United States v. Utah, 283 U.S. 64 (1931). I recognize that State of Utah v. United States, 304 F.2d 23 (10th Cir. 1962) held that the 55-mile portion of the San Juan River within the State of Utah was not navigable at time of Utah's admission to the Union, January 4, 1896.

The areas in issue are San Juan River, Bluff to Mexican Hat; Colorado River, Rose Ranch to Castle Creek; Dolores River, Utah State line to confluence.

Unless it be determined that these are nonnavigable portions of rivers only, BLM seemingly is arrogating unto itself authority it does not possess.

The Board's decision in Canon Tours, Inc., 20 IBLA 216, 219 (1975), implicitly recognizes, albeit grudgingly, this limitation upon BLM authority.

The Regional Solicitor's opinion (SLCU) dated February 13, 1973, captioned "BLM Administrative Authority on Navigable and Non-navigable Water Systems Traversing BLM -- Administered Land," apparently is the source relied upon by BLM. It reads in part as follows:

The provisions of 43 U.S.C. 931 are as follows: "[a]ll navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both." Federal authority over navigable streams is thus limited to regulations in aid of commerce and navigation. You would be proscribed from issuing regulations that would result in the impairment of the public's right to use the navigable portions of the rivers in question as a public highway.

As to the non-navigable portions of these streams, the Bureau of Land Management would have the same rights with respect thereto as applied to the public lands in general. You would, of course, retain the right to regulate the use of rivers. It is our opinion that you presently have authority to regulate the commercial and noncommercial uses that may develop on these rivers. This

conclusion if founded upon the following facts: (1) Much of the area in question is composed of public lands; (2) You have authority over the lands riparian to the navigable portions of the streams; and (3) You have general authority over the non-navigable portions of the rivers.

I respectfully suggest that the Regional Solicitor's opinion, to the extent that it holds that BLM has "authority to regulate the commercial and noncommercial uses that may develop on these [navigable] rivers," has no rational justification.

Since the main opinion of the Board is favorable to appellant, I shall not pursue this point further at this time.

Frederick Fishman  
Administrative Judge

